Supreme Court, U.S.
FILED
MAY 31 2002

No. 01-1582

IN THE

Supreme Court of the United States

SAMUEL FIRESTONE, CALVIN MIYASHIRO, JACK PUTNAM, AND BRIAN FRAZEN,

Petitioners,

v.

SOUTHERN CALIFORNIA GAS COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

W. DAVIS SMITH
ROBERT D. CADISH
OFFICE OF THE GENERAL COUNSEL
SEMPRA ENERGY
101 Ash Street, Suite 1200
San Diego, CA 92101-3017
(619) 699-5192

KENNETH W. ANDERSON
Counsel of Record
PAUL DECAMP
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

Counsel for Respondent

30 pp

QUESTIONS PRESENTED

1. When a state statute or regulation fixes a minimum labor standard requiring employers to pay their employees a "premium wage rate" which is greater than their "regular rate" for all work in excess of 8 hours in one day and 40 hours in one week, do the terms "premium wage rate" and "regular rate" as found in that standard require the interpretation of a collective bargaining agreement such that any claim by a union employee to enforce the standard is pre-empted by Section 301 of the Labor Management Relations Act?

2. If the answer to the first issue is yes, can a state statute or regulation allowing unions to "opt out" of its minimum labor standards fix as its test for whether a union has elected to opt out a procedure which requires the interpretation of a collective bargaining agreement without having the opt-out test itself be pre-empted under Section 301 of the Labor Management Relations Act?

3. If a claim created by state law requires the interpretation of a collective bargaining agreement, does pre-emption by Section 301 of the Labor Management Relations Act require that the claim be substantially extinguished?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties to the proceeding in the court below. Pursuant to Rule 29.6 of the Rules of this Court, respondent Southern California Gas Company states that it is a California corporation whose parent corporation is Sempra Energy, also a California corporation, and that no other publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

RESPONDENT'S BRIEF IN OPPOSITION 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. Factual Background 3

II. Proceedings In The District Court 5

III. Proceedings In The Court Of Appeals 8

IV. "Companion Proceedings" In State Court Rejecting Petitioners' State-Law Claim On The Merits 9

REASONS FOR DENYING THE WRIT 10

I. The First Question Presented Is Not Appropriate For Review 12

A. The First Question Is Not Properly Presented On This Record 12

B. The First Question Seeks Review Of Only Factual Determinations 14

C. Because Petitioners' Overtime Claim Fails As A Matter Of State Law, This Court Should Not Address Pre-Emption.....16

II. The Second Question Presented Is Not Appropriate For Review.....17

A. The Second Question Confuses LMRA And NLRA Pre-Emption And Was Never Addressed Below.....17

B. The Court Of Appeals Correctly Upheld California's Collective Bargaining Agreement Exemption To Its Overtime Law As A Valid "Familiar And Narrowly Drawn" Opt-Out Provision.....19

C. Because Petitioners' Overtime Claim Fails As A Matter Of State Law, This Court Should Not Address Pre-Emption.....20

III. The Third Question Presented Is Not Appropriate For Review.....21

A. The Third Question Was Never Addressed Below.....21

B. Footnote 18 Of *Livadas* Is Irrelevant To This Case.....21

C. Because Petitioners' Overtime Claim Fails As A Matter Of State Law, This Court Should Not Address Footnote 18 Of *Livadas*.....23

CONCLUSION.....23

TABLE OF AUTHORITIES

Page(s)

Cases

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) ..... passim

Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936) 16,23

Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948) 15

Collyer Insulated Wire, Gulf & Western Systems Co., 192 N.L.R.B. 837 (1971) 21,22

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 12,18,20

Livadas v. Bradshaw, 512 U.S. 107 (1994) ..... passim

Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33 (1885) 16

Lujan v. Southern Cal. Gas Co., 96 Cal. App. 4th 1200, 117 Cal. Rptr. 2d 828 (2002), *petition for review filed* (Apr. 23, 2002) 9,10,16,17

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) 13,17,21

Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967) 11

National Broadcasting Co. v. Bradshaw, 70 F.3d 69 (9th Cir. 1995) 6,8,18,20

Rawson v. Tosco Ref. Co., 57 Cal. App. 4th 1520, 67 Cal. Rptr. 2d 790 (1997) 18,20

Skyline Homes, Inc. v. Department of Indus. Relations, 165 Cal. App. 3d 239, 211 Cal. Rptr. 792 (1985) 6

Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448 (1957) 10

Three Affiliated Tribes of Fort Bethold Reservation v. Wold Eng'g, P.C., 467 U.S. 138 (1984) 16

Tidewater Marine W., Inc. v. Bradshaw, 14 Cal. 4th 557, 927 P.2d 296 (Cal. 1996) 6

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 11,14,15

Walling v. Harnischfeger Corp., 325 U.S. 427 (1945) 15

Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419 (1945) 15

Statutes and Regulations

28 U.S.C. § 1254(1) 2

29 U.S.C. § 157 11

29 U.S.C. § 185 (Labor Management Relations Act, § 301) ..... passim

29 U.S.C. § 185(a) 2

Cal. Lab. Code § 515(d) 6

29 C.F.R. §§ 778.111-.112 4

Cal. Code Regs. tit. 8, § 11040(3)(G) (1989) (California Industrial Welfare Commission Wage Order 4, § 3(G)) ..... passim

Rules

Sup. Ct. R. 10 16

Sup. Ct. R. 29.6 ii

RESPONDENT'S BRIEF IN OPPOSITION

Petitioners present three questions for review and then virtually ignore those questions in the body of their petition. Such a gambit seems appropriate, given the unsuitability of each of those issues for review on this or any other record. This case involves nothing more than the lower court's straightforward application of well-settled legal principles to the collective bargaining agreement at issue. The lower court expressly cited and followed this Court's precedents regarding pre-emption of state-law claims under Section 301 of the Labor Management Relations Act (the "LMRA"), 29 U.S.C. § 185. Given the fact-specific nature of the pre-emption inquiry, the implications of the decision below extend to only *five* parties: the four individual petitioners and respondent Southern California Gas Company ("SCGC").

Indeed, this case does not properly present any of the questions posed. Among other things, the first question is so broad as to be irrelevant, because the obvious answer compelled by this Court's pre-emption jurisprudence is that the LMRA pre-empts some state-law overtime claims but not others, depending on the extent to which a claim requires interpretation of a collective bargaining agreement. The second question confuses pre-emption under the LMRA with pre-emption under the National Labor Relations Act (the "NLRA") and was not addressed below. And the third question is based on an apparent misstatement of a footnote in a decision of this Court, was not raised below until petitioners sought rehearing, and was not addressed by the lower court.

Moreover, petitioners concede, as they must, that the state-law claim that they currently ask this Court to rescue from pre-emption has itself been obliterated by the California courts. In other words, petitioners would lose this case even if this Court reverses the pre-emption ruling. This case is in all respects unworthy of this Court's review.

OPINIONS BELOW

The opinions of the Court of Appeals (Pet. App. 4a-13a, 1a-3a) are reported at 219 F.3d 1063 (9th Cir. 2000) and 281 F.3d 801 (9th Cir. 2002), respectively. The opinion of the District Court (Pet. App. 14a-31a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 2000. A petition for panel rehearing and suggestion for rehearing en banc was denied on February 12, 2002. Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 301(a) of the LMRA, 29 U.S.C. § 185(a), provides, in pertinent part: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." The full text of Section 301 is reproduced at Pet. App. 47a-48a.

Section 3(G) of the version of California Industrial Welfare Commission Wage Order 4, Cal. Code Regs. tit. 8, § 11040(3)(G), that was in effect during the time period relevant to this litigation – 1995 to 1998 – provides, in pertinent part: "[T]his section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage." The full text of this former version of Wage Order 4, also known as Wage Order 4-89, is reproduced at Pet. App. 49a-56a.

STATEMENT OF THE CASE

I. Factual Background

Petitioners are four individual former full-time meter readers for SCGC. C.A. Excerpts 156, 157. In 1995, SCGC and the unions representing petitioners adopted, through collective bargaining, a compensation arrangement entitled "Pay-Per-Route (PPR) for Meter Reading and Meter Reading A/B Routes." Under that system, all meter readers were paid flat sums for completing assigned meter reading routes. SCGC employed "A" meter readers, who were guaranteed a day rate equal to eight hours' pay, and "B" meter readers, who worked shorter routes and were guaranteed a day rate equal to 6.75 hours' pay. The flat sum paid for each route was calculated by multiplying the hourly rate set forth in the collective bargaining agreement (the "CBA") – $16.56 per hour until August 1, 1997, and $17.77 thereafter – by the amount of time SCGC allotted for the route. Meter readers who completed their routes in less than the allotted time nevertheless received the full flat sum designated for their route. Pet. App. 6a; C.A. Excerpts 112-113.

Meter readers who took more than eight hours to complete their routes received additional compensation for this overtime work. For work days assigned by SCGC to exceed eight hours – e.g., a route designated to take ten hours and completed in ten hours – the meter reader would receive, in addition to a flat sum for the route equal to the total allotted hours multiplied by the CBA hourly rate, an overtime premium of one half of that hourly rate for the allotted hours beyond eight.[1] C.A. Excerpts 114, 132.

---

[1] Thus, in the example given, a meter reader who completed in ten hours a route for which SCGC allotted ten hours would receive a flat sum equal to the contract hourly rate (i.e., $16.56 or $17.77 per hour) for the allotted ten hours and an overtime premium of

For unassigned overtime – e.g., a route designated to take eight hours and completed in ten hours – the Pay-Per-Route document calls for the employee to receive the flat sum for the allotted time (i.e., the hourly rate multiplied by the allotted hours), plus an overtime premium calculated as follows: *(assigned hours / actual hours) x 0.3334 x (actual hours - 8) x (1.5 x hourly rate)*. Pet. App. 6a-7a; C.A. Excerpts 133-135. Although the subject of a factual dispute below, SCGC actually paid its meter readers for unassigned overtime using a slightly different formula that yields the same result, because of the need to adapt SCGC's compensation system to the computerized payroll system. Meter readers working unassigned overtime actually were paid their flat sum (i.e., the allotted hours multiplied by the contractual hourly rate), plus an overtime premium calculated as follows: *(flat sum / total hours worked) x (actual hours - 8) x 0.5*. Pet. App. 6a-7a; C.A. Excerpts 113, 114, 146. The actual payments to SCGC meter readers were designed to comply with the U.S. Department of Labor's Fair Labor Standards Act regulations applicable to "day rate" or "piece rate" compensation systems, 29 C.F.R. §§ 778.111-.112. C.A. Excerpts 113.

SCGC meter readers rarely worked substantial amounts of overtime. SCGC studies demonstrated that on average "A" meter readers worked seven hours and three minutes per day. Eighty-four percent of "A" meter readers complete their work in less than eight hours per day. Only one in five hundred meter routes have taken more than eleven hours to complete, and on only one occasion during a three-month study of 6,877 routes did a meter reader take more than twelve hours to complete an eight-hour assignment. C.A. Excerpts 115. Petitioners presented no evidence below suggesting that they ever worked twelve or more hours in a day.

---

one half that rate (i.e., $8.28 or $8.89 per hour) for the ninth and tenth hours. C.A. Excerpts 114.

One of the signatory unions to the CBA, along with its members, filed grievances challenging the Pay-Per-Route system. The union and its members elected *not* to proceed to arbitration on their grievances, however, because they concluded that the arbitrator would reject their claims and rule in favor of SCGC. Further bargaining in February 1998 stemming from union dissatisfaction with the Pay-Per-Route system led to the elimination of the position of full-time meter reader. Pet. App. 20a; C.A. Excerpts 152-153. Therefore, most, if not all, of the parties' dispute is limited to the time period 1995 through 1998.

II. Proceedings In The District Court

Petitioners' complaint, filed in the District Court for the Central District of California as a putative class action, alleged, inter alia, that SCGC failed to pay daily and weekly overtime pursuant to the version of California Industrial Welfare Commission Wage Order 4 then in effect (and amended numerous times since).[2] C.A. Excerpts 154-167; Pet. App. 49a-56a. SCGC moved for summary judgment, arguing, inter alia, that petitioners' state-law overtime claim is pre-empted under Section 301 of the LMRA because its resolution requires interpreting the CBA, including the Pay-Per-Route document. C.A. Excerpts 111; Pet. App. 14a-15a.

The District Court granted SCGC's motion, concluding that petitioners' state-law overtime claim is pre-empted. Pet. App. 30a-31a. The District Court carefully reviewed and considered this Court's LMRA pre-emption case law. *Id.* at 23a-25a. The District Court correctly noted that California law provides an exemption from its overtime requirements for any employee "covered by a collective bargaining agreement if said agreement provides premium wage rates for

---

[2] No class was ever certified. Petitioners also asserted other claims not relevant to their certiorari petition.

overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage." *Id.* at 26a (quoting Section 3(G) of the former version of Wage Order 4, reproduced at Pet. App. 56a). Thus, if the exemption applied, petitioners' California-law overtime claim failed.[3]

While petitioners were indisputably covered by a CBA that provided for the requisite cash wage rate, the District Court observed that the parties disputed whether the "agreement provides premium wage rates" for overtime. The court noted SCGC's argument that a fact finder must interpret the CBA to determine whether petitioners' pay constitutes compensation on an hourly, salary, piece-rate, or day-rate basis, which in turn determines petitioners' "regular rate" of pay under California law for purposes of calculating overtime,[4]

---

[3] The District Court rejected petitioners' argument that the Section 3(G) exemption was pre-empted by virtue of this Court's holding in *Livadas v. Bradshaw*, 512 U.S. 107 (1994), noting that the Ninth Circuit had upheld an identical exemption in *National Broadcasting Co. v. Bradshaw*, 70 F.3d 69, 73 (9th Cir. 1995), as valid under *Livadas*. Pet. App. 26a.

[4] Under California law, an employee paid on an hourly basis and not otherwise exempt from the overtime laws is entitled to receive one and one half times his or her "regular rate," which will equal the employee's normal hourly rate, for most overtime hours, with double-time pay for certain overtime hours. Pet. App. 53a. For non-exempt salaried employees, by contrast, the California Division of Labor Standards Enforcement, the administrative agency charged with enforcing California's Labor Code, took the position, subsequently codified at Section 515(d) of the California Labor Code, that the regular rate is determined by dividing total non-discretionary weekly earnings, less any overtime premium pay, by no more than the first forty hours of work. *Skyline Homes, Inc. v. Department of Indus. Relations*, 165 Cal. App. 3d 239, 245, 211 Cal. Rptr. 792, 795 (1985), *overruled on other grounds*, *Tidewater*

which ultimately determines whether the payments provided for by the CBA constitute "premium" wages for overtime hours. Because the parties disputed petitioners' "regular rate" and whether the CBA provided for "premium" pay, the District Court determined that petitioners' California-law overtime claim required interpreting, not "merely referring to," the CBA. Pet. App. 27a-28a. Because petitioners had failed to exhaust their mandatory grievance and arbitration procedure, the District Court entered summary judgment in SCGC's favor. *Id.* at 28a.

Marine W., Inc. v. Bradshaw, 14 Cal. 4th 557, 927 P.2d 296 (Cal. 1996). Because the entire salary is deemed to be allocated to only the first forty hours of work, most overtime hours must be compensated at one and one half times the regular rate, in addition to the employee's salary. Pet. App. 53. If, on the other hand, a non-exempt employee is deemed to work on a piece-rate or day-rate basis, the regular rate is determined by dividing total weekly pay by *all* hours worked. C.A. Excerpts 45-47, 66. An additional overtime premium of one-half of the regular rate per overtime hour would then be owed.

This difference in methodology yields a lower regular rate for piece-rate or day-rate workers than for hourly or salaried workers with similar wages and hours, and the overtime owed to a salaried non-exempt employee is more than three times the overtime owed to a non-exempt piece-rate or day-rate employee, a ratio that increases with hours worked. For example, if a salaried non-exempt employee and a piece-rate non-exempt employee each work 60 hours in a week for $600 in wages, the salaried employee's regular rate would be $600 divided by 40 hours, or $15 per hour. The employer would owe that employee twenty hours' overtime pay at time-and-a-half, or 20 x 1.5 x $15, which is $450. The regular rate for the piece-rate employee would be $600 divided by 60 hours, or $10 per hour. The overtime due would be twenty hours at half-time, or 20 x 0.5 x $10, which is $100.

III. Proceedings In The Court Of Appeals

Petitioners appealed to the Court of Appeals for the Ninth Circuit, which affirmed on essentially the same bases stated by the District Court. Pet. App. 4a-11a. The court conducted its own thorough and detailed review of this Court's LMRA pre-emption decisions, concluding that "resolution of this issue requires interpretation of the agreement" and that "the state law overtime claim is therefore pre-empted." *Id.* at 8a. The Court of Appeals also rejected petitioners' argument that California's Section 3(G) exemption is pre-empted, holding that the exemption was a "familiar and narrowly drawn opt-out provision[]" that is valid under *Livadas* and the Ninth Circuit's prior construction of an identical California exemption in *National Broadcasting Co.* *Id.* at 10a-11a.

Petitioners then sought panel and en banc rehearing, reiterating many of their prior points. Petitioners also argued for the first time that the Ninth Circuit should address whether this case is suitable for arbitration pursuant to footnote 18 of *Livadas*, in which this Court commented that "[h]olding the plaintiff's cause of action substantively[5] extinguished may not . . . always be the only means of vindicating the arbitrator's primacy as the bargained-for contract interpreter." Appellants' Pet. for Reh'g and Reh'g En Banc 14 (quoting *Livadas*, 512 U.S. at 124 n.18). The Ninth Circuit denied rehearing and rehearing en banc without addressing petitioners' new argument. Pet. App. 1a-3a.

---

[5] Petitioners misquoted the footnote as saying "substantially" extinguished, an error they repeat in their petition, including in the third question presented.

IV. "Companion Proceedings" In State Court Rejecting Petitioners' State-Law Claim On The Merits

As petitioners note, after this action was filed, the State of California instituted "[c]ompanion [p]roceedings" in California state court "over the exact same overtime practice with respect to the exact same class of employees (meter readers)."[6] Pet. 12. The Superior Court granted summary judgment in favor of the State, and SCGC appealed. On appeal, the California Court of Appeal rejected SCGC's Section 301 pre-emption argument, concluding – erroneously in SCGC's view – that "[t]he parties do not dispute how Employer calculates the overtime wages." *Lujan v. Southern Cal. Gas Co.*, 96 Cal. App. 4th 1200, 1210, 117 Cal. Rptr. 2d 828, 836 (2002), *petition for review filed* (Apr. 23, 2002).[7]

Although the California court found no LMRA pre-emption, the court nevertheless reversed *on the merits* the summary judgment that had been granted in favor of the State, construing Wage Order 4 as exempting SCGC from overtime liability in all instances except where the overtime rate paid does not exceed the contractual hourly rate (i.e., $16.56 or $17.77, depending on the date). Based on the indisputable rarity of meter readers working very long days, the Court of Appeal held that "under the most typical scenario, the PPR [Pay-Per-Route] does provide for a 'premium' above the 'regular pay' and the exemption would apply." *Id.* at 1212, 117 Cal. Rptr. at 837. Indeed, under the examples that the Court of Appeal used, SCGC would owe overtime *only*

---

[6] The state court action, for which class certification was unnecessary, was an enforcement action on behalf of virtually the same class of employees petitioners purported to represent in their federal court action, but for which certification was never granted.

[7] Arthur Lujan was substituted as named plaintiff upon replacing Jose Millan as California Labor Commissioner, a change that occurred before formal publication of the California court's opinion.

where an employee worked twelve or more hours in a day, a situation that the record established occurred only once in an entire three-month period. *Id.* Because there was a possibility that a very small handful of SCGC employees might qualify for overtime for a day or two here and there, the court remanded the matter to the Superior Court to determine which employees, "if any," qualify for overtime in light of this interpretation of Wage Order 4. *Id.* at 1212-13, 117 Cal. Rptr. at 837-38.

REASONS FOR DENYING THE WRIT

The courts below applied to the particular CBA at issue the well-settled principles established by this Court's decisions concerning pre-emption under the LMRA and the NLRA. The lower courts correctly engaged in the requisite analysis and presented their straightforward conclusions. In doing so, the lower courts neither departed from this Court's decisions nor articulated new legal rules. Before discussing why the questions presented are inappropriate for review by this Court, some background concerning LMRA and NLRA pre-emption is appropriate.

Over the past five decades, this Court has developed and articulated the relevant standards governing LMRA pre-emption. In order to further the strong federal interest in uniform interpretation of collective bargaining agreements, "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957). Not every state-law claim involving unionized employees, however, is pre-empted under Section 301. "[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation . . . does not require the claim to be extinguished" under the LMRA. *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994).

Nevertheless, this Court has long acknowledged the importance of alternative dispute resolution to federal labor law: "[T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). This Court has recognized that "[c]laims involving vacation or overtime pay, work assignment, [and] unfair discharge" are within the "range of disputes traditionally resolved through arbitration." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985). "A rule that permitted an individual to sidestep available grievance procedures would," as this Court has observed, "cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id.* at 220 (citation omitted). Thus, under the LMRA, "when resolution of a state-law claim is *substantially dependent upon analysis of the terms of an agreement* made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Id.* (citation omitted) (emphasis added).

With regard to pre-emption under the NLRA, this Court has applied traditional conflict pre-emption analysis. Section 7 of the NLRA, 29 U.S.C. § 157, guarantees employees the right to bargain collectively. State laws that nullify the rights of employees under the NLRA have been held to be pre-empted under the Supremacy Clause of the United States Constitution as in conflict with federal law. "A state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." *Livadas*, 512 U.S. at 116 (invalidating state agency's policy of declining to process wage claims filed by employees covered by CBA). *See also Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 239-40 (1967) (invalidat-

ing state law denying unemployment benefits to persons who had filed unfair labor practice charge pursuant to NLRA).

Where, however, a state law differentiating between unionized and non-unionized employees "works no intrusion on collective bargaining" and instead "balance[s] the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment," there is no conflict with federal law, and therefore no pre-emption under the NLRA. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22 (1987) (rejecting NLRA pre-emption challenge to state statute providing one week's severance pay for employees in the event of a plant closing, but exempting employees covered by a contract providing for severance pay). Thus, where the "minimum protections" of state law are "relinquished not by the mere act of signing an employment contract (or collective-bargaining agreement), but only by the parties' express agreement on different terms," the NLRA does not pre-empt state law. *Livadas*, 512 U.S. at 131. States frequently enact such "opt out" statutes, which permit unionized employees collectively to bargain away certain rights granted by state labor law in exchange for other benefits and concessions from their employer, and this Court has endorsed "the validity of these familiar and narrowly drawn opt-out provisions." *Id.* at 132.

The petitioners' questions presented can be properly evaluated only in light of this substantial body of settled precedent.

I. The First Question Presented Is Not Appropriate For Review

A. The First Question Is Not Properly Presented On This Record

The first question asks this Court to decide whether, regardless of the terms of an applicable collective bargaining agreement, determining an employee's "regular rate" of pay

or whether the employee has received "premium" pay in connection with a state-law wage and hour claim requires interpretation of the CBA and thus leads to pre-emption under Section 301 of the LMRA. *See Allis-Chalmers*, 471 U.S. at 220. This question was not addressed below, and this Court "generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996).

Moreover, the first question presented is far too broad to be of any help to petitioners. Plainly, there are some instances in which a union member's state-law wage claim can be resolved without interpreting the CBA. For example, where an employee and an employer agree on the regular rate and the existence (or not) of premium pay, but perhaps disagree concerning other aspects of a wage claim such as the number of days or hours worked, there would be no need to interpret the CBA to determine the regular or premium rate. Likewise, if an employee and an employer agree that the method of compensation is a flat weekly salary, or a day-rate or piece-rate arrangement, or a commission program, then there may be no need to interpret the CBA to determine the regular or premium rate. Moreover, if the CBA is for some reason silent regarding overtime, then resolution of an overtime claim would probably not implicate the terms of the CBA.

On the other hand, there clearly are cases in which determining the regular or premium rate will require CBA interpretation. Where, for example, a CBA provides for various pay grades, and an employee sues alleging an entitlement to overtime based on a higher pay grade than the rate at which he or she was compensated, it would likely be necessary to interpret the terms of the CBA to evaluate whether the employee was entitled to the higher regular rate. Similarly, where, as here, an employer and certain of its employees dispute the nature of the compensation system, and the CBA

sets forth and defines the compensation system, the CBA must be interpreted to determine the regular rate and the presence of any premium wage.

Thus, the first question presented is not formulated in a way that lends itself to meaningful application to this case. Nor did the lower courts decide that question. Instead, those courts answered the very different, and much narrower, question whether these petitioners' state-law overtime claim is pre-empted in light of this particular CBA.

B. The First Question Seeks Review Of Only Factual Determinations

The lower courts expressly cited and applied this Court's LMRA pre-emption decisions without announcing new legal rules or departing from this Court's precedents. Pet. App. 5a-10a, 23a-28a. Petitioners do not challenge the legal rules that the courts applied, but rather the specific application of those rules to the particular CBA at issue. Both the District Court and the Court of Appeals found that they would be required to interpret disputed aspects of the CBA in order to determine petitioners' "regular rate" of pay and the existence of "premium" overtime pay in the course of resolving petitioners' state-law overtime claim, and thus Section 301 of the LMRA pre-empted that claim.

It has long been settled that interpreting a collective bargaining agreement involves more than merely examining the four corners of a document. "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). Here, the parties dispute whether petitioners were paid on an hourly, salaried, day-rate, or piece-rate basis, an issue that must be decided before petitioners' overtime claim

could be adjudicated. The terms of the CBA itself, the parties' conduct under the CBA, the parties' intent in entering into the CBA, and the course of the collective bargaining would all potentially be relevant to this inquiry. Petitioners have failed to demonstrate either legal error or abuse of discretion by the District Court in finding that petitioners' state-law claim is "substantially dependent upon analysis of" the CBA, *Allis-Chalmers*, 471 U.S. at 220; nor have they shown legal error by the Court of Appeals in affirming the District Court's pre-emption finding.

Petitioners' reliance on *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945), and *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945), for the proposition that their "regular rate" is a "fact" with an existence entirely independent of the CBA is misplaced. First, those cases predate the enactment of the LMRA by two years and thus are of questionable relevance regarding whether determining a "regular rate" requires CBA interpretation. Second, those cases, properly construed, stand only for the narrower proposition that a nominal "regular rate" specified in a CBA will be disregarded by the courts when it is "wholly unrealistic and artificial" and does not comport with the parties' actual practices. *Youngerman-Reynolds*, 325 U.S. at 424 (quotation omitted); *see also Harnischfeger*, 325 U.S. at 430 (emphasizing "actual payments" rather than "contract nomenclature"). Third, case law from this Court following the enactment of the LMRA demonstrates that "*the words of and the practices under the contract* are the determinative factors in finding the regular rate for each individual." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464 (1948) (emphasis added). Under *United Steelworkers*, such matters are properly factual issues for the arbitrator to evaluate, and thus they give rise to Section 301 pre-emption.

The manner in which the courts below applied LMRA pre-emption case law to one specific CBA is not a matter of

great national importance. Because each CBA is different, this case is *sui generis* and has no implications beyond the five parties to the litigation. Petitioners merely dispute a factual finding, which is not a proper basis for certiorari. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

C. Because Petitioners' Overtime Claim Fails As A Matter Of State Law, This Court Should Not Address Pre-Emption

It is the long-settled practice of this Court to avoid adjudicating constitutional issues unnecessarily or prematurely. *See, e.g., Three Affiliated Tribes of Fort Bethold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157-58 (1984); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (noting that a court should "not anticipate a question of constitutional law in advance of the necessity of deciding it"); *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). Pre-emption of state-law claims pursuant to Section 301 of the LMRA, of course, implicates the Supremacy Clause of Article VI of the United States Constitution. *See, e.g., Allis-Chalmers*, 471 U.S. at 208.

Petitioners ask this Court to reverse the Ninth Circuit's pre-emption ruling so that they may proceed with their overtime claim pursuant to California law. The California courts have already spoken, however, concerning the merits of petitioners' overtime claim. The California Court of Appeal in *Lujan v. Southern California Gas Co.* held that SCGC's compensation system for meter readers does not violate California law except in the extremely rare instance (once in an entire three-month period) in which an employee works twelve or more hours in a day. 96 Cal. App. 4th at 1212, 117 Cal. Rptr. 2d at 837. Thus, it is unnecessary for this Court to

decide the Supremacy Clause issue. Regardless of how the pre-emption issue is decided, petitioners still lose. Thus, the case is effectively moot, as petitioners acknowledge in conceding that "there is very little left of their state-law claims." Pet. 12-13. Although petitioners make a feeble attempt to minimize the effect of *Lujan* by suggesting that if their state-law claim is reinstated they could argue below that the California Court of Appeal erred in its interpretation of Wage Order 4, Pet. 13 n.8, they offer no plausible scenario under which they could persuade the Ninth Circuit that the California state court misinterpreted California law. Moreover, the pre-emption of a state-law claim that itself has no merit implicates no significant state interests or individual rights.

For these reasons, certiorari should be denied as to the first question presented.

II. The Second Question Presented Is Not Appropriate For Review

A. The Second Question Confuses LMRA And NLRA Pre-Emption And Was Never Addressed Below

The second question asks the Court to decide whether a state law may use as its standard for an opt-out provision a test that may lead to LMRA pre-emption by virtue of the need to interpret a CBA, without that opt-out provision itself being pre-empted by the LMRA. That issue was not addressed below, nor do petitioners cite any authority bearing on that issue. *See Matsushita*, 516 U.S. at 379 n.5 ("[W]e generally do not address arguments that were not the basis for the decision below."). In reality, petitioners have confused pre-emption under the NLRA and pre-emption under the LMRA.

Indeed, both the District Court and the Ninth Circuit understood petitioners to be arguing that California's Section 3(G) exemption was pre-empted by the NLRA, not the

LMRA. Pet. App. 10a-11a, 26a. This result is not surprising, given that the decisions relied on by petitioners below for the proposition that Section 3(G) is pre-empted because it allegedly burdens the rights of employees to bargain collectively involve pre-emption based on conflict with the federal labor policies embodied in the NLRA. *See, e.g.*, *Livadas*, 512 U.S. at 110, 116-18 (invalidating state agency's policy of declining to process wage claims filed by employees covered by CBA: "We hold that federal law pre-empts this policy, as abridging the exercise of such employees' rights under the National Labor Relations Act . . . ."); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 6-7, 20-22 (1987) (upholding state law requiring payment of one week's severance pay upon plant closing except where employees are otherwise covered by contract providing for severance pay: "We hold . . . that the Maine law is not pre-empted by the NLRA . . . .").

As this Court's decisions make clear, the NLRA pre-empts state laws or practices that unduly burden or interfere with the collective bargaining and other rights established in the NLRA. Such pre-empted state laws or policies are deemed to conflict with, and thus must yield to, federal law pursuant to the Supremacy Clause, and as a result they have no force. *E.g.*, *Livadas*, 512 U.S. at 116-18. Of course, petitioners can identify no divergence of authority concerning whether Section 3(G) is pre-empted under the NLRA, and both the Ninth Circuit and California state courts have upheld Section 3(G) against NLRA pre-emption challenges. *See National Broad. Co.*, 70 F.3d at 73 (addressing identically worded opt-out provision in different California Wage Order); *Rawson v. Tosco Ref. Co.*, 57 Cal. App. 4th 1520, 1524-25, 67 Cal. Rptr. 2d 790, 793 (1997) (same).

LMRA pre-emption, on the other hand, does not purport to abrogate state laws that conflict with federal law. Instead, Section 301 pre-emption recharacterizes *claims* that implicate an existing CBA as arising under federal law and the CBA

itself where there is a risk of inconsistent interpretation if state law were applied. *See, e.g.*, *Allis-Chalmers*, 471 U.S. at 209-10. Thus, LMRA pre-emption achieves uniformity in CBA interpretation, whereas NLRA pre-emption removes obstacles to collective bargaining.

It simply makes no sense to ask whether Section 301 of the LMRA pre-empts California's Section 3(G) opt-out, because Section 3(G) does not give rise to a *claim* on the part of SCGC as against petitioners that could or would be recharacterized as a federal law claim under the CBA. Instead, because petitioners' claim depends on whether Section 3(G)'s criteria have been satisfied, Section 301 pre-empts petitioners' claim against SCGC. Even assuming that Section 301 pre-emption could apply to Section 3(G), however, the result would not be to invalidate Section 3(G), but rather to recharacterize the entire dispute as arising under federal law. In either event, petitioners' state-law claim is pre-empted, the same result as was obtained below.

B. The Court Of Appeals Correctly Upheld California's Collective Bargaining Agreement Exemption To Its Overtime Law As A Valid "Familiar And Narrowly Drawn" Opt-Out Provision

California's Section 3(G) opt-out provision exempts from coverage under the state overtime law "any employee covered by a collective bargaining agreement" that provides both (1) "premium wage rates for overtime work" and (2) "a cash wage rate . . . of not less than one dollar ($1.00) per hour more than the minimum wage." Pet. App. 56a. Petitioners argued below that this opt-out provision violates federal law, as construed in *Livadas*, because it denies union employees protections under state law available to non-union employees.

Livadas, however, draws a sharp distinction between state laws that unfairly burden an employee's decision to ex-

ercise rights under the NLRA as opposed to "familiar and narrowly drawn opt-out provisions" under which "union-represented employees have the full protection of the minimum standard, absent any agreement for something different." 512 U.S. at 131-32. As the Court of Appeals concluded, California's statute "neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA." Pet. App. 10a (quoting *Fort Halifax*, 482 U.S. at 20-21). Instead, Section 3(G) applies "only to those who have sought and received alternative wage protections through the collective bargaining process" and thus is valid under *Livadas* and *Fort Halifax*. Pet. App. 10a-11a. As previously noted, both federal and state courts have upheld identical opt-outs challenged under the NLRA. *See National Broad. Co.*, 70 F.3d at 73; *Rawson*, 57 Cal. App. 4th at 1524-25, 67 Cal. Rptr. 2d at 793.

The lower courts properly determined that Section 3(G) is not pre-empted by the NLRA, and that decision is in accord with the rulings of other courts. Moreover, the rulings below are entirely consistent with this Court's analysis in *Livadas*. Thus, there is no basis for granting review.

C. Because Petitioners' Overtime Claim Fails As A Matter Of State Law, This Court Should Not Address Pre-Emption

As discussed above, *see supra* Part I.C, petitioners' claim fails as a matter of state law. Thus, there is no reason for this Court to decide a federal pre-emption question of constitutional dimension in aid of petitioners' still-born California overtime claim.

For these reasons, certiorari should be denied as to the second question presented.

III. The Third Question Presented Is Not Appropriate For Review

A. The Third Question Was Never Addressed Below

The third question presented, which in fact derives from a misquotation of footnote 18 of this Court's decision in *Livadas*, asks this Court to decide whether LMRA pre-emption always requires that a claim be extinguished. What petitioners apparently seek is a ruling that their claim may proceed in arbitration. Petitioners did not raise this issue below until their petition for rehearing in the Ninth Circuit, and the Ninth Circuit did not address that claim. *See Matsushita*, 516 U.S. at 379 n.5 ("[W]e generally do not address arguments that were not the basis for the decision below."). Indeed, petitioners do not identify any reason whatsoever that would support a grant of review on this fact-dependent issue notwithstanding their waiver. Even assuming that footnote 18 of *Livadas* contemplates that some category of cases might be appropriate for disposition other than through extinguishing the pre-empted claim, this case surely is not such a case, nor do petitioners even attempt to argue why their case represents an appropriate candidate for such unusual treatment.

B. Footnote 18 Of *Livadas* Is Irrelevant To This Case

In the portion of footnote 18 of *Livadas* upon which petitioners rely, this Court observed that "[h]olding the plaintiff's cause of action substantively extinguished may not . . . always be the only means of vindicating the arbitrator's primacy as the bargained-for contract interpreter. *Cf. Collyer Insulated Wire, Gulf & Western Systems Co.*, 192 N.L.R.B. 837 (1971)." 512 U.S. at 124 n.18. Assuming that their California overtime claim is pre-empted by Section 301, petitioners ask this Court "to determine whether," in lieu of the extinguishment of their state-law claim, "there are other ac-

ceptable means available, such as staying the action pending arbitration of any issue relating to the interpretation of a collective bargaining agreement." Pet. 21. Petitioners' reliance on footnote 18 is entirely inapt.

The reference to *Collyer* in footnote 18 demonstrates that the concept that this Court was addressing is that sometimes claims could be permitted to proceed to arbitration rather than being extinguished under Section 301 of the LMRA. In *Collyer*, the National Labor Relations Board articulated a policy of deferring consideration of issues arising under the NLRA pending consideration by a labor arbitrator acting pursuant to a CBA. That same policy obviously makes sense for many circumstances that might arise under the LMRA. Where a labor arbitration is underway concerning claims that fall within the scope of Section 301 preemption, it may be appropriate for courts to stay litigation pending the outcome of the arbitration.

Here, of course, upon concluding that the state-law claim was pre-empted under Section 301, the District Court found that petitioners "have failed to exhaust their remedies through the grievance and arbitration process contained in the CBAs, and in fact *specifically declined to do so* because they believed these attempts would be unsuccessful." Pet. App. 28a (emphasis added). Far from there being a pending labor arbitration involving parallel issues, petitioners actively evaded their contractual duty to pursue a grievance and arbitration. Having chosen to side-step mandatory arbitration in favor of litigating their claim, petitioners cannot now be heard to complain that they should have been permitted to arbitrate in the first place. They *were* permitted, indeed required, to do so, and they improperly elected to litigate instead. Thus, this case bears no resemblance whatsoever to the situation contemplated in footnote 18 of *Livadas*, and clarifying footnote 18 would not resolve any material issue in dispute in this case.

C. Because Petitioners' Overtime Claim Fails As A Matter Of State Law, This Court Should Not Address Footnote 18 Of *Livadas*

As discussed above, *see supra* Part I.C, petitioners' claim fails as a matter of state law. Thus, there is no reason for this Court to address the contours of LMRA pre-emption, an issue under the Supremacy Clause. Well-settled practice dictates foregoing review in light of the inevitable result in this case. *See, e.g., Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (noting that a court should "not anticipate a question of constitutional law in advance of the necessity of deciding it").

For these reasons, certiorari should be denied as to the third question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

W. DAVIS SMITH
ROBERT D. CADISH
OFFICE OF THE GENERAL COUNSEL
SEMPRA ENERGY
101 Ash Street, Suite 1200
San Diego, CA 92101-3017
(619) 699-5192

KENNETH W. ANDERSON
Counsel of Record
PAUL DECAMP
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

Counsel for Respondent

May 31, 2002